THE RURAL TELEPHONE COALITION

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February 6, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554

Re: Reply Comments of the Rural Telephone Coalition
CC Docket No. 96-45 (Report to Congress)

Dear Ms. Salas:

Transmitted herewith, on behalf of the Rural Telephone Coalition, are an original and 9 copies of its reply comments in the above-referenced proceeding.

In the event of any questions concerning this matter, please communicate with this office.

Very truly yours,

Margot Smiley Humphrey

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	(Report to Congress)
Federal-State Joint Board on	)	DA 98-2
Universal Service	)	

REPLY COMMENTS OF THE RURAL TELEPHONE COALITION FOR THE UNIVERSAL SERVICE REPORT TO CONGRESS

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February 6, 1998

TABLE OF CONTENTS

SUMMARY

The FCC has a unique opportunity with this Congressionally-mandated universal service report to fix and refine the fundamental flaws and reaffirm the strengths of its universal service decisions. From a broad spectrum of voices, from US Senators and Representatives, state officials to universal service providers, there is support for changes, particularly with regard to the FCC's demand that even the most rural states foot 75% of the bill for meeting the federally set standards for universal service, including reasonable rural and urban parity in rates, services and access to state of the art telecommunications and information resources. The 25% share accepted by the FCC forsakes Congress's commitment to spread the cost of universally beneficial nationwide, affordable, evolving services, penalizes high cost states, and will force higher rates or customer add-ons for high cost and low income support in rural America. Increased cost burdens on rural customers is the last thing lawmakers had in mind in enacting §254. The Wisconsin PSC is right that it makes no sense to implement the national policy by making high cost areas subsidize themselves.

Proponents for preserving FCC exemptions for the telecommunications components provided by Internet access providers from responsibilities shouldered by providers of identical telecommunications not mixed with information manipulation try in vain to find justification in the law and legislative history for their preferential treatment. Careful reading of the statute and painstaking tracking of the development of its new definitions, confirmed by the thorough explanation of two key Senators involved in its enactment, prove that the FCC has erred by

clinging to the obsolete and unnecessary notion of mutually exclusive "enhanced" and "basic" services. Congress faced increasing information and telecommunications convergence, including Internet telephony, with a new framework that acknowledges a telecommunications component when mixed with an information service. Misreading the statute to preserve the outmoded approach threatens to distort competition and dry up universal service support. The FCC should treat providers of hybrid telecommunications and information services the same way it treats interexchange carrier access and other providers that use of the local distribution network the same way. The FCC should broaden still further its application of the §254(d) federal support contribution responsibility to include Internet access providers. It should also step in quickly to prevent interexchange carriers from imposing new charges or "fees" on rural customers to which such charges do not apply.

Finally, the FCC should correct its mistaken rules that (a) let carriers qualify for high cost support via unbundled elements that cannot reasonably be viewed as the carriers' "own facilities" under §214(e) and (b) let non-carriers receive support for non-telecommunications services. The FCC should also adopt the wise standards USTA suggests — limiting support to stand-alone, federally defined universal services provided at the "affordable" rates designated by a state, other than for schools, libraries and rural health service providers. Otherwise, US ratepayers will be forced to pay support for integrated, high priced packages involving premium services — eg. mobility and roaming capabilities — that are not included in the federal definition of universal fixed local service.

Before the

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Washington, D.C. 20554

In the Matter of	)	CC Docket No. 96-45
	)	(Report to Congress)
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Universal Service	)	

REPLY COMMENTS OF THE RURAL TELEPHONE COALITION

I. INTRODUCTION

The comments filed in response to Congress's extraordinary enactment of a requirement for an FCC report to Congress on implementation of the universal service provisions of the Telecommunications Act of 1996 demonstrate strong support for FCC reexamination and revision of the decisions made thus far and still underway before the §254 Joint Board and the FCC. The RTC and others have raised a host of problems. The RTC reiterates that this review provides a healthy opportunity both (a) to reaffirm the strong points of the FCC's actions in adapting universal service programs to the new law and (b) to revisit and take appropriate steps

to remedy and refine the aspects of the federal universal service scheme that do not adequately embody the plain language and controlling principles of the Act or the underlying intent of Congress. There is broad based encouragement from members of the U.S. Senate and House of Representatives,[1] state commissions,[2] governors[3] and state legislators,[4] as well as various industry voices, to make some fundamental changes. Accordingly, the FCC has ample support to proceed in this review and in deciding issues raised by the pending petitions for reconsideration of its universal service and access charge proceedings to mend fences with Congress and the states and to face its high cost and low income support responsibilities with the same zeal it brought to implementing the school, library and rural health care provider discounts. Indeed, for at least some of the issues raised here, such as the FCC's shifting to the states 75% of the responsibility for funding the federal support mechanism required by §254 (d) and (e), the FCC should seriously consider immediate, i.e. expedited, corrective action. Prompt and decisive remedial action could relieve all parties of the need to pursue or defend earlier faulty decisions now before the Fifth Circuit for judicial review.

II. THE RECORD CONTAINS COMPELLING SUPPORT FOR ELIMINATING THE 25% CAP ON FEDERAL FUNDING FOR THE SUPPORT NECESSARY UNDER THE FEDERAL UNIVERSAL SERVICE MECHANISM

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[1] Letter Comments of Senators Stevens and Burns; US West, Attachment 2 (letters from 75 Senators and Members of Congress representing states it serves).

[2] Eg., Comments of state regulatory agencies of Alabama, Alaska, Arkansas, Georgia, Idaho, Kentucky, Maine, Montana, New Hampshire, New Mexico, North Carolina, South Carolina, Vermont and West Virginia (Ala. et. al);Wisconsin PSC; Washington UTC; Nebraska PSC.

[3] Western Governors Association.

[4] Transportation Committee of the Nebraska Legislature.

Many of the comments provide convincing legal and factual proof that §254 cannot be satisfied by the FCC's federal mechanism: The FCC has unilaterally limited contributions to the federal mechanism required by §254(d) to 25% of what the federal mechanism itself identifies as necessary to achieve the universal service mandate in the law. Some point out (Alaska, pp. 1-6) that the 25% cap undermines the national policy and national support framework, supplemented by discretionary state mechanisms, enacted by the 1996 Act. On a closely related question, a number of comments (e.g., Alabama, et al.; pp. 6-7 Texas PUC, pp.3-4) agree that the FCC should not redirect interstate support to reducing interstate access charges instead of keeping local rates affordable because that, too, would slash support for affordable local rates. Many (e.g., Alabama, et al., pp.2-5; Mississippi PSC, pp.1-2; Utah Governor Michael O. Leavitt, p.1; Western Governors' Association) express deep concern that the 75% burden will fall with the greatest severity and most adverse impact on universal service in the highest cost, most rural states. Those states have the least low-cost metropolitan area service to help support statewide service meeting the §254 principles of "affordable" and "reasonably comparable" rural and urban rates, services and access to advanced telecommunications and information services. The New Mexico Attorney General agrees (pp.2-4) that the 75% state burden would threaten affordable rates and reasonable rate parity in his state, correctly reminding the FCC that the federal mechanism implementing the national statutory principle of comparability cannot reduce it to comparability within a high cost state.

Participants have also tried to quantify the impact, using various assumptions the FCC is considering. For example, state regulators such as the Wisconsin PSC (pp. 1-6) explain that dumping 75% of the federal universal service support contribution burden onto the states would

require intrastate assessments of 5-15% of the intrastate revenues in Wisconsin and more than 50% in South Dakota. Wyoming estimated (p. 2) that a forward looking cost proxy model and 75% state burden alone would leave it to recover an extra $51.75 per customer per month to make up for the lost interstate revenues. [5] Puerto Rico Telephone Company echoes the dilemma for insular providers, noting that the proxy plan and 75% "state" burden would severely reduce its current interstate contribution level. Alaska (p. 14) points to an average of $10 per month per line throughout Alaska that intrastate sources will have to cover unless the FCC relents on its decision to shirk three-quarters of the responsibility for the federal mechanism. US West's analysis, using assumptions that the FCC has under consideration in its proceeding to determine proxy costs of service for price cap carriers, concludes (p.7) that "customers in 39 states will pay substantially higher rates to maintain service," contrary to the law's commitment to affordable rates and to the intent of Congress. Indeed, as evidence of the latter, U.S. West includes letters challenging the 75% state support load from Senators and Congress members in its 14-state region. Senators Stevens and Burns filed a letter stating (p.12) that the 25% federal ceiling seriously jeopardizes the current interstate revenue streams from the existing loop-expense adjustment, DEM Weighting, Long Term support and access charges, on which high cost area service providers depend for up to 85% of their costs to provide affordable service.[6]

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[5] Deaveraged costs in some parts of Wyoming are $100 per customer per month or more (ibid.).

[6] In this regard, GTE (p. 4) and the letter from Senators Stevens and Burns (p. 9) point out that access charges still provide significant implicit support. The Wisconsin PSC (pp. 1-5) and GTE (p.30) also explain that the 25% the FCC has described as carrying forward the current interstate loop cost responsibility omits the high cost support mechanisms and has no persuasive factual or economic basis.

Support for the 25% is half-hearted, at best. For example, SBC says (p.5) that 25% could be "conceptually correct . . .for non-rural telephone companies" if the FCC scrapped the mainstay of its universal service support mechanism — the promised forward looking proxy model based on the theoretical costs of an imaginary provider. Bell Atlantic (p.7) seems to oppose fully-federal support, but the South Dakota PSC (p. 2) insists correctly that federal support must "fund the federal definition of universal service at the 100% level, not 25%" to be "sufficient." Even states that are willing to consider a joint federal-state program reject 25%: Wisconsin (pp.4-5) discusses a split based on relative state and interstate revenues, which it says amounts to 100% federal responsibility using both interstate and intrastate revenues to assess contributions,[7] and throws out alternatives of a one-third state share or 50-50 split, noting that the impact is the crucial factor. As Wisconsin sums it up (p. 5), the goal is to relieve customers and areas that the marketplace would not offer affordable services. Thus, "high cost areas should not be required to subsidize themselves. Such a plan will not work. " The FCC should eliminate the 25% federal share cap as §254 requires.

III. THE PLAIN LANGUAGE, LEGISLATIVE HISTORY AND CONGRESSIONAL INTENT OF THE 1996 ACT DISCREDIT THE FCC'S FORMER FICTION THAT TELECOMMUNICATIONS SERVICES PROVIDED ALONG WITH INFORMATION SERVICES BECOME SOLELY INFORMATION SERVICES

The RTC disputed the FCC's determination that Internet access has no cognizable "telecommunications service" component and that Internet access providers do not in any

[7] The FCC adopted the 75% state share because some state regulators opposed apportioning contributions on the basis of unseparated, inter- and intrastate revenues. For unknown reasons, Nevada, which US West has shown would face a heavy state support burden with the 25% federal cap, continues to argue that the federal program must ignore intrastate revenues.

circumstances act as "telecommunications carriers" or "telecommunications" providers. The letter-comments filed by Senators Stevens and Burns (pp. 6-7) confirm that this narrow reading will preclude future support for Internet access under §254. Preventing the mandated "evolving" federally-defined universal service for high cost residential and business customers from including Internet access, they say, even if it meets all the guidelines for universal services in subsection (c), interposes a crippling obstacle to the evolving telecommunications and information opportunities for rural Americans Congress intended in enacting §254. Others argue against the narrow, mutually-exclusive reading of "telecommunications" and "telecommunications services" as opposed to "information services" (e.g. Airtouch, p. 27, AT&T, p.10) because the interpretation relieves Internet providers from making universal service contributions under §254(d).

Comments filed by Internet and other Information Service Providers (ISPs) and their advocates for maintaining the FCC's pre-Act "contamination" theory -- that the telecommunications component of a hybrid service merges into the unregulated information service -- give several reasons. Several, like the US Internet Providers Association, simply assert that the FCC's distinction and the related access charge exemption should be retained. Some (e.g., Internet Access Coalition, pp. 11-12; NCTA, pp. 8-11) cling to the mutually exclusive interpretation because they think ISPs should remain deregulated. Yet others (Commercial Internet Exchange Association, pp. 3-4) argue that the FCC's pre-Act "enhanced" and "basic" services dichotomy remains in force, in some cases (Information Technology Industry Council, pp. 2-7; Internet Access Coalition, pp. 3-10) claiming that the 1996 Act's legislative history proves that Congress intended to preserve that division of the realms of information and

telecommunications.

None of these defenses can justify the irrational, disparate, discriminatory, marketplace-distorting treatment of telecommunications functions the ISPs want. First, the comments that apparently regard 100% non-telecommunications treatment as necessary to keeping information services deregulated have not made their case. Senators Burns and Stevens explain (p.3; see, also RTC, p. 15) that the 1996 Act's forbearance authority allows the FCC to refrain from regulation where appropriate, eliminating the need for elaborate fictions like the "contamination" theory to avoid sweeping genuine information service functions under telecommunications regulation. Senators Stevens and Burns express concern over using the contamination theory to shield ISPs from all telecommunications oversight when Internet providers have begun to provide telephony indistinguishable from telecommunications service. They point out (pp.7-9) that Internet telephone, fax and e-mail (i.e. "paperless fax") service use the local exchange network identically to exchange access. The two Senators warn (ibid.) that the FCC's exclusion of Internet access from the realm of telecommunications threatens to divert the very traffic that supports universal service on the Public Switched Telephone Network.

Ameritech (p.3) suggests that only a "substantial" telecommunications "component" of a hybrid information and telecommunications offering should be required to contribute to universal service support mechanisms, which would leave the information component unaffected. Bell South (pp. 2-3) points to the FCC's distinction between the information and telecommunications components in 911 and E911 services to support similar recognition of the two components in Internet access service. This common sense solution would also lay to rest any legitimate fear of reregulating information provision or availability of the Internet as an information resource.

Undeniably, treating the telecommunications component of information offerings differently from the same activity provided without an information component is not competitively neutral.

One argument in favor of applying the clumsy enhanced vs. basic services construct to the definitions of "telecommunications," "telecommunications service," "telecommunications carrier" and "information service" in the 1996 Act that seems persuasive at first rests on the legislative history of the key definitions in the new law. To defend the FCC's exemption of Internet access and other ISPs from universal service contributions and access charges, the information and Internet access providers endeavor to prove that the Act's definitions build on the basic and enhanced service regulatory framework. Knowing the answer they want to find, it is not surprising that the Internet Access Coalition, first, reads the definition of information services as provided "via telecommunications" to indicate that information services include and submerge all telecommunications functions (pp. 3-7). It then reads the 1996 Act's cluster of "telecommunications" definitions as excluding — rather than simply distinguishing — two severable components of the Internet access provider's offering (pp. 7-10). It jumps back (eg., p. 4) to legislative history from before the Conference Report agreements, again assuming that any distinctions between information and telecommunications providers must be read as evidence of intent to codify mutually exclusive domains for "information services" and "telecommunications"/ "telecommunications services."

While the Internet group's arguments seem persuasive at first reading, Senators Stevens and Burns expose their fundamental error. The Senators, both major forces in shaping the new law, explain the plain language of the definitions and their legislative history in the context of the "major overhaul" of the national telecommunications environment wrought by the 1996 Act.

Their perspective not only sweeps away the claim that the new law incorporates and codifies the pre-Act basic and enhanced services framework, but in doing so also demonstrates why (p.1) "the Commission's current policies [defended by the information and Internet access providers] will seriously undermine the universal service, competitive neutrality, and local competition, goals that were at the heart of the ... amendments." They trace (pp. 4-6) the words added, deleted, changed and omitted from the new statutory definitions as Congress broadened the definitions to comport with the accelerating convergence of information and telecommunications and its desire to apply telecommunications policy to telecommunications functions. Even the term "common carrier," the letter shows (p.5), can now apply to an ISP partially — though "only to the extent that it is engaged in providing telecommunications services." Such activity is no longer excluded by association with or "regulated only as an information service."

Contrary to the legislative history the Internet Access Coalition repeatedly brandishes (pp. 4,6,12), the Senators point out (p.5) that the specific statutory language the earlier report described as providing that "a telecommunications service did not include an information service was struck before he final definitions were adopted." These key legislators thus validate the "conduit" function that distinguishes telecommunications transmission from information provision. They flatly reject the FCC's version on public policy grounds, too, because: "If Internet conduit service is not a telecommunications service, then that service can never be supported as part of universal service under the terms of section 254."

The FCC should take this opportunity to correct its mistake in importing its pre-Act enhanced/basic service dichotomy into Congress's new regime. It should embrace Congress's new approach built on a more realistic and up-to-date view of the telecommunications/conduit

component of the mixed or hybrid offerings of information service providers — including Internet access providers. The exponential growth in the number of Internet users and traffic on the Internet can no longer be ignored in decision making that affects the manner in which universal service is achieved and determines who will share its costs.[8] It cannot be denied that Internet traffic imposes substantial costs on the network, that the traffic is mostly interstate and that it involves the "transmission of information ... without change in forum or content of the information sent and received." 47 USC §153 (43).

IV. THE FCC SHOULD FURTHER BROADEN THE RESPONSIBILITY TO CONTRIBUTE TO THE FEDERAL UNIVERSAL SERVICE MECHANISM

The FCC has correctly taken a wide view of who should contribute to the federal support mechanism. Nevertheless, the RTC remains concerned that the Commission has allowed providers of the telecommunications component of information access to avoid contributing by treating Internet access providers as "end users" and exempting them from access charges. While Internet access providers (eg., Commercial Internet Exchange Association p.15) argue that they pay enough support by paying local business rates, they are well aware that they do not pay a share equal to interexchange access customers and direct contributors under §254(d). Otherwise they would not need to contend so strenuously against shouldering a competitively neutral equal share with the telecommunications providers they seek to compete with through Internet telephony, Internet fax service and even e-mail. (Stevens and Burns, pp. 7-9).

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[8] A Feb. 3, 1998 NUA Internet Surveys reports that U.S. web users have grown by over 10 million since August 1997, a 24% rise. See www.nua ie/surveys.

USTA (pp. 3-5) and a number of other commentors from a variety of segments of the telecommunications industry and state regulatory authorities spell out why the FCC has little latitude to deviate from the words of the law on who should contribute. USTA states that, while the Commission may have express authority to make determinations of which less obvious providers should contribute under a public interest standard, it has no authority to make determinations of what parties are exempt from contribution, except when an entity's contribution would be de minimus.[9] Consequently, thc FCC had no basis in the statute for its determination that Internet Service providers should be exempt from contributing to universal service support, as it directed in its May 8, 1997, order on universal service.[10]

AT&T (p. 3) agrees with the RTC and USTA on this point, stating that the success of universal service requires a broad contribution base. AT&T also agrees that Internet service providers should contribute support to the universal service system.[11]

AT&T and Sprint Corporation also raise the issue of how contributions in support of universal service can or should be recovered. Interestingly, both point out that, while the FCC may not have specifically prohibited carriers from passing through such costs to end users, it barred them from labeling universal service cost recovery charges on consumer bills as a line-item

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[9] 47 U.S.C. §254(d).

[10] See, In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report and Order released May 8, 1997, at Section X.

[11] AT&T clarifies that while it believes universal service support of Internet Access is not warranted under Section 254(h)(1)(B), it questions how the FCC can logically justify such support without also holding that Internet service providers must also contribute to universal service.

surcharge.[12] It has come to the attention of the associations comprising the RTC that at least some large interexchange carriers, already are or soon plan to itemize such costs on consumer bills throughout the country, including in rural areas that should not be affected even if the billing practice met the FCC's general policies. The RTC brought this situation to the FCC's attention in a February 3 letter FCC Chairman William Kennard and urges the FCC to use the opportunity of this congressionally mandated universal service report to reiterate the agency's policy in this regard and prevent the application of such charges to rural ILEC customers.

The FCC should continue to take a wide view of who should contribute. As part of this ongoing assessment, it should rethink its earlier contribution exceptions that are discussed above.

V. THE FCC SHOULD LIMIT FEDERAL SUPPORT PAYMENTS TO PROVIDERS OF UNIVERSAL SERVICE PROPERLY DESIGNATED BY STATES UNDER §214(e)

The RTC's comments urged the FCC to correct its statutory interpretation with regard to who is eligible to receive support under Section 254 of the Communications Act. We called specific attention to the fact that the FCC's interpretation of the statute would allow ETC designation of carriers that neither construct facilities nor meet the resale plus construction requirement imposed by §214(e). This not only undermines the ability of truly eligible facilities-based or facilities-and-resale-based carriers to provide universal service, but also results in an inflated and wasteful program at nationwide ratepayers' expense.

BellSouth and a number of other parties take exception to the fact that the FCC has overstepped its authority in invoking nonexistent implied authority to extend universal service support to non-carriers that provide non-telecommunications services to schools and libraries.

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[12] See, Report and Order released May 8, 1997, ¶855.

BellSouth states that this action "cannot be reconciled with the plain language of the statute."[13] SBC Communications Inc. wrote: "Neither a literal reading of the Act nor an implied one can reconcile the Commission's interpretation with the public policy Congress intended to implement."[14]

The National Cable Television Association in its comments attempts to suggest that the legislative history of the development of the Section 254(h) provisions legitimizes the FCC's determination to allow non-ETC designated entities to receive universal service support. Unfortunately, all it can point to for legislative history is the floor speech of a single advocate of the schools and libraries provisions.[15] Such a statement is no replacement for actual report or statutory language which is agreed to by the entire Congress and the Administration.

The RTC also agrees with USTA (p. 7) that universal service support should not be available unless carriers provide the universal services within the federal definition on a stand-alone basis throughout high cost areas and to low income customers at the universal service rates each state has found "affordable" for a designated eligible carrier. [16] It is one thing to make support portable for genuine universal services. But this does not justify making nationwide customers foot the bill to subsidize expensive integrated packages that include but exceed the universal services required by §214(e)(1). For example, universal service in the current federal definition does not provide

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[13] See, Bellsouth Corporation, p.9

[14] See, SBC Communications Inc., p. 3.

[15] See, National Cable Television Association, p.12, n.31.

[16] The provisions for schools, libraries and rural health care providers in §254(h) contain their own framework.

support for mobility of communications or roaming capability. Accordingly, eligible carrier designation and portable support should be limited to the fixed use of CMRS services.

For these reasons, the RTC believes the FCC should revisit the issue of who is eligible to receive support, for what services and at what rates, for the purpose of tightening its perspective of this matter in the ways we advocate -- to spare ratepayers from the excess costs of supporting more than universal service makes necessary.

VI. CONCLUSION

The FCC should respond to Congress's universal service report requirement by fixing the parts of its universal service plan that fail to carry out the plain meaning and intent of the new law. The RTC urges it to accept full responsibility for the federally-defined level of universal service, rather than punishing high cost states with 75% of the federal high cost responsibility. It should treat the telecommunications part of Internet access service like any other use of local exchange access to provide services to the public, subject to appropriate federal charges and §254(d) contribution obligations. It should prevent unlawful imposition of pass-through charges or "fees" by interexchange carriers on rural customers not required to pay them. And it should not make

U.S. ratepayers pay to support service by a carrier without any facilities that are legitimately "its own" or to subsidize non-carrier providers of non-telecommunications services.

Respectfully submitted,

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Certificate of Service

I, Sheila V. Hickman, a secretary in the offices of Koteen & Naftalin, hereby certify that true copies of the foregoing reply comments of The Rural Telephone Coalition have been served on the parties of the attached service list, via first class mail, postage prepaid, on the 6th day of February, 1998.

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